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COMMENTS OF DOMINION RESOURCES INC. ON DOE NOTICE OF PROPOSED RULEMAKING 10 CFR PART 609

RIN 1901-AB21

Dominion Resources Inc. ("Dominion") appreciates the opportunity to comment on the Department of Energy's ("DOE's") Notice of Proposed Rulemaking ("NOPR") governing the loan guarantee program authorized by Title XVII of the Energy Policy Act of 2005 ("EPAct 2005"). The loan guarantee program is critical to the deployment of new and significantly improved clean energy technologies and, as a direct result thereof, to the realization of some of the Nation's most important energy policies. As set forth below, Dominion firmly believes that certain changes to the NOPR are necessary if the loan guarantee program is to realize its intended purposes and promise.

Background

Dominion is one of the Nation's largest producers of energy. Its electric portfolio includes more than 26,500 MWs of generation, comprised of both utility and non-utility assets. Dominion is also one of the Nation's premier nuclear operators. It owns and operates seven nuclear units at four sites, in Virginia, Connecticut and Wisconsin, with more than 5,700 MWs of capacity. Over the last three years, those nuclear facilities had an average net capacity factor of 91.9 percent. The Surry and North Anna units in Virginia were among the early nuclear power plants constructed in this country. They began commercial operation in 1972 and 1978 respectively, and today they provide approximately one-third of Virginia's electricity.[1]

A strong commitment to nuclear generation has been, and will remain, a fundamental attribute of Dominion, and the company has long taken a leadership position in the nuclear industry. For example, it was the first to apply for a license for a facility for away-from-reactor used fuel storage. Dominion has successfully seen six of its seven nuclear units through the Nuclear Regulatory Commission's ("NRC's") license extension process. Immediately upon purchasing the Kewaunee unit in 2005, the company began the license renewal application work for that unit as well; the renewal application is scheduled for submission to the NRC in 2008. As a result, Dominion has current, first-hand experience with successfully navigating the rigors of an NRC licensing process.

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[1] North Anna and Surry have both set operational and outage performance records and have attracted international attention for their innovative programs, achievements and efficiency.

Similarly, Dominion has been in the forefront of planning for the development of new reactors. The company has taken a leadership role with the Nuclear Energy Institute new plant task forces and initiatives; it serves on the advisory boards of several reactor vendors; and it has been active in EPRI's new plant initiatives. More importantly, since 2001, the company has been systematically working through the issues leading to a decision to deploy a new reactor.

In conjunction with DOE, the company developed a siting study methodology, and then used that methodology to select its North Anna site as its preferred location for new nuclear generation. The Dominion team also performed a detailed constructability study of the various new reactor technologies to assure itself that the schedule estimates reactor vendors were providing are achievable. In addition, the company developed a staffing model for a new plant, and it evaluated decommissioning funding needs. These steps were necessary in developing a roadmap for a new nuclear power station.

In 2003, the company submitted an application for an Early Site Permit ("ESP") for the North Anna site. The ESP application analyzes most of the site suitability and environmental issues involved with adding one or more new nuclear units at that location. The mandatory hearing before the Atomic Safety and Licensing Board ("ASLB") was conducted in April, and on Friday, June 29, the ASLB issued an Initial Decision finding in favor of the ESP for North Anna. Dominion expects the NRC to issue the final ESP later this year.

Concurrent with the development of the ESP application, the company evaluated various reactor technologies. The company selected the General Electric Economic Simplified Boiling Water Reactor ("ESBWR") design as its preferred technology and, in 2005, entered into a cooperative agreement with DOE under the Nuclear Power 2010 program to conduct the necessary engineering and licensing tasks to provide the basis for a decision to build an ESBWR unit. This project includes obtaining a design certification for the GE design, preparing and obtaining a combined construction and operating license ("COL") from the NRC for an ESBWR unit at North Anna, and completing all the engineering and project planning necessary to begin construction.

Dominion has a strong commitment to moving forward with a new nuclear unit, which Dominion has designated North Anna unit 3 and which it intends to develop as an asset of its regulated utility, Dominion Virginia Power. The company is in the process of completing its COL application, and it expects to submit the first licensing application for an ESBWR to the NRC this fall. Dominion has also executed an agreement with General Electric for certain long-lead-time components such as forgings and other nuclear and turbine island parts based on the ESBWR design. Securing these items was essential to preserving a potential 2015 commercial operation date.

In parallel with its project development efforts, Dominion strongly supported legislation that was recently enacted in Virginia.[2] To ensure a reliable and adequate

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[2] Virginia House Bill 3068 and Senate Bill 1416 (2007).

supply of electricity in Virginia, the legislation encourages construction of new generation by a regulated utility with provisions for an enhanced rate of return. Depending on the type of generation facility, the enhanced return is between one and two percent over that allowed on the utility's general rate base, and it applies through the first 5 to 25 years of the service life of a new plant. The legislation puts new nuclear generation at the top of the range of both aspects of this incentive provision: 2 percent return enhancement for up to 25 years of service life. The legislation also provides that, after 2008, the enhanced return on construction work in progress will not be deferred during the construction phase, but will be collected currently in rates. This important provision of the law greatly reduces the risk profile of a new North Anna unit 3.

Clearly, the Virginia legislation demonstrates the strong support for new regulated nuclear generation in the state, and it provides added assurance that the North Anna 3 unit will succeed. Nevertheless, through all of its planning and preparation, Dominion has understood the economic reality that a federal loan guarantee is essential to raise the capital necessary to build this plant.[3] Thus, Dominion was a strong supporter of Title XVII of EPAct 2005, and since its passage, Dominion has been pressing for the opportunity to commence the loan guarantee application process. Dominion urges DOE to take seriously the comments submitted herein and those that it receives from others in the energy industry and from the financial community about the changes to the proposed 10 CFR Part 609 that are essential. Dominion also urges DOE to finalize the rule as rapidly as possible, so that DOE and industry can move forward together expeditiously to realize the promise of advanced energy technologies. Dominion is ready to proceed with its loan guarantee application.

On issues not specifically addressed in the comments that follow, Dominion supports and joins in the comments of the Nuclear Energy Institute.

Summary of Issues Addressed

Briefly summarized, Dominion's comments address the following key issues:

1. The importance of the availability of sufficient appropriations authority to allow for loan guarantees for multiple base load generation facilities.

2. The importance of the availability of loan guarantees covering 100 percent of a debt instrument, up to the statutory limit of 80 percent of the cost of a project.

3. The inappropriateness of requiring a credit rating with respect to the risk associated with early adoption of a new technology—the very risk that makes the loan guarantee program essential and that would render meaningless the credit rating that DOE proposes to require.

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[3] Dominion has not made a final decision to proceed with North Anna unit 3, and the uncertainties surrounding the loan guarantee program represent one of the major reasons for the delay in final decision making.

4. The desirability of amending the rule to afford priority processing, including early feedback, to those applicants that present a lower risk profile by virtue of their seeking a significantly reduced loan term.

5. The importance of providing transparency in the process for calculating the Credit Subsidy Cost associated with each loan guarantee application and of affording an applicant the opportunity to comment on DOE's Credit Subsidy Cost calculation.

6. The unwarranted and perverse consequences of DOE's proposal to treat as a negative factor the receipt of other federal financial assistance.

7. The erroneous assumption reflected in the rule that all loan guarantee applicants have technology rights that they would be able to "assure" will be available for further commercial application.

8. The over-breadth of the proposed requirement to include in a loan guarantee application "all legal opinions . . . related to the project."

9. The infeasibility as applied to nuclear projects of the first alternative DOE proposes for defining "Commercial Technology."

10. The inappropriateness of requiring loan applicants to pledge assets beyond those associated with the project.

As set forth in greater detail below, modifications to the proposed rule to address these issues are essential if the loan guarantee program is to play the role EPAct 2005 envisions of ensuring prompt deployment of advanced technologies that respond to the Nation's vital need for clean energy options.

Comments on 10 CFR Part 609

1. Availability of Appropriations Authority

Section 609.9(c)(1) of the NOPR provides that DOE must have received authority in an appropriations act before it can issue a loan guarantee. As the Government Accountability Office found,[4] this conclusion is contrary to the terms of Section 1702(b) of EPAct 2005, 42 U.S.C. § 16512(b), which provides for two alternatives: appropriations act authority *or* a payment from the borrower of the cost of the obligation. In light of DOE's announced position that a recipient of a loan guarantee will be required to fully fund up front the Credit Subsidy Cost,[5] the alternative of appropriations act

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[4] GAO, *DOE: Key Steps Needed to Help Ensure the Success of the New Loan Guarantee Program for Innovative Technologies by Better Managing Its Financial Risk*, GAO-07-339R (Feb. 27, 2007).

[5] NOPR at 24-25, 72 Fed. Reg. 27477 (May 16, 2007).

authority should not come into play. However, if DOE is going to continue to adhere to the view that appropriations authority is required, it must seek and obtain sufficient appropriations authority to allow the loan guarantee program to succeed. Neither the total of $4 billion appropriations authority provided for in the 2007 Continuing Resolution, nor the $4 billion in appropriations authority for central power generation provided for under DOE's 2008 budget proposal is even remotely adequate to the task.

Since long before the passage of EPAct, it has been a hallmark of U.S. energy policy that the Nation must improve its energy security, reduce its reliance on imported sources of energy, and reduce the carbon intensity of our economy, including most notably from the power sector. Deployment of advanced energy technologies, including new or significantly improved base load power generation technologies, is critical to achieving those goals, and the government has a vital role to play in ensuring that occurs. Indeed, many have suggested that supporting the development of new energy technologies to meet the new demands of our world today is a policy objective that deserves the kind of national commitment and financial support that the Apollo space program and the Manhattan Project received in the past.

The multi-billion dollar costs associated with any single significant base load generating project make it clear beyond dispute that $4 billion in annual appropriations authority to cover all central power generation technologies is not sufficient to the task at hand. Dominion urges DOE reconsider its position on the appropriations authority issue. However, if it is going to continue to seek appropriations authority for the loan guarantee program, it must seek it on a scale that is commensurate with the Nation's energy needs and policies.

2. 100 Percent Guarantee

Dominion is aware that DOE has heard from many of the intended beneficiaries of the loan guarantee program and from the financial community how critically important it is that loan guarantees be available for 100 percent of the guaranteed debt instrument. Dominion strongly shares that view. Indeed, Dominion has been advised by several major providers in the debt market that there are no commercially available financial structures that would comply with the requirements of the NOPR as written, thus making it improbable that Dominion could obtain economically viable financing for North Anna unit 3. As a practical matter, a 100 percent guarantee of a debt instrument is required to finance the plant.[6]

Dominion understands DOE's interest in ensuring that any guaranteed loan present "a reasonable prospect of repayment" by the borrower, and thus as little risk to the federal treasury as possible. But the approach DOE has proposed to serve that end—guaranteeing 90 percent of a project loan—could have multiple perverse results: an increased rather than decreased cost of debt for a guaranteed project; a reduced equity commitment from a project sponsor; and a debt instrument that cannot be sold in the

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[6] The proposed rules aggravate the problem of a partial guarantee by imposing a "'no stripping" restriction. *See* footnote 7, *infra*.

capital markets where such loans must be marketed to raise the kind of money necessary to support new nuclear plants and other large advanced energy projects. There are ample other means to assure that projects seeking loan guarantees receive thorough scrutiny and that no unduly risky projects receive guarantees.

First, and most obviously, the project sponsor must raise at least the 20 percent of project costs that does not qualify for the guarantee. Some industry estimates are that a new nuclear plant may cost more than $5 billion. That means that more than $1 billion in funding will have to come from a combination of equity and debt that does not enjoy the guarantee and that will stand in line behind the federal government in the event of default. The intense scrutiny that the capital markets insist upon for any investment of that kind and magnitude should give DOE confidence that the private sector sources of funding will have concluded that a project is worthy of support long before a loan guarantee application is submitted. It also ensures that the project will receive a high level of attention throughout its life.

More specifically, Dominion can assure DOE that its management fully appreciates and approaches with the utmost seriousness the duty it owes to its shareholders and its ratepayers to undertake such an investment only if it has a very high degree of confidence the project will succeed. Exposure in excess of $1 billion dollars surely represents the kind of risk-sharing on the part of the private sector that DOE is looking for, while creating an unmarketable hybrid form of debt does not achieve that result, nor serve any legitimate purpose.[7]

Second, DOE proposes to require that a national credit agency provide a credit assessment of the project at the time of a loan guarantee application and a credit rating at the time of financial closing. Sections 609.6(b)(21) and 609.9(f). Dominion believes that, with a critical modification discussed in Section 3 below, that requirement will provide DOE with a further level of assurance that is entirely consistent with the kind of assurances the commercial debt market routinely demands.

Finally, as DOE surely understands, nothing can replace its own duty of due diligence. With the appropriate advice from its own outside financial and technical advisers, DOE will be able to obtain through the due diligence process exactly the same kind of risk judgment private lenders rely on when they make loans every day. Under the proposed rule, DOE will then transfer the burden of that risk judgment directly to the project sponsor through the imposition of the Credit Subsidy Cost. That charge is

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[7] DOE aggravates the problem of the hybrid debt—that is, the marrying of the guaranteed portion of the debt, bearing the AAA rating government-backed debt enjoys, and the remaining portion of the debt, which will receive a significantly lower rating—through its proposal to prohibit the "stripping" of the guaranteed debt from the unguaranteed debt for purposes of secondary market financings. Section 609.10(d)(4). DOE's "no stripping" proposal ignores the reality that the markets for AAA government-backed debt and for higher risk/higher reward debt are simply different markets, and there is no existing market for a combination of the two. The stripping issue will be resolved, however, if DOE allows loan guarantee applicants to obtain the guarantee on 100 percent of the value of a debt instrument.

imposed specifically to cover the risk a project involves and, under the proposed rule, the project sponsor will have to make a non-refundable payment in that amount up front. This requirement provides a further layer of assurance to DOE that the project sponsor will thoroughly test and scrutinize its own decision-making process about the likelihood of success of the project at the outset and continue to give it the highest level of management attention throughout the life of the project.

These three layers of protection make clearly unnecessary the further requirement that there be an indivisible unguaranteed portion of any loan that is to receive a guarantee. If DOE persists in its determination to impose such a requirement, it will render the loan guarantee program inaccessible—at least to the very large, capital intensive projects like new nuclear plants that arguably have the most to contribute to the achievement of the underlying statutory objectives.

3. Credit Assessment

In Sections 609.6(b)(21) and 609.9(f) of the proposed rule, DOE proposes to require that a loan guarantee applicant first obtain a credit "assessment" and, at time of closing, a credit "rating" from a national credit rating agency, which assessment or rating does not take into account the loan guarantee. This proposed requirement ignores the fact that Wall Street has made it clear that the debt market will not assume the "early mover" risk on advanced energy technology projects. Congress made the loan guarantee program available in recognition that a large portion of advanced energy technology projects would not be financed at all without the guarantee program. What this means is that the projects cannot be meaningfully evaluated if only the loan guarantee is assumed away.

At the same time, Dominion understands that, if the loan guarantee is taken into account, the debt instrument will necessarily receive the AAA rating that government-backed debt enjoys, and thus would not provide DOE with useful information concerning project quality and risk. Dominion believes that there is an alternative form of independent credit assessment that would give DOE a meaningful analysis of the credit risk of a project without undermining the statutory objective of providing loan guarantees for the deployment of advanced energy technologies not yet in general commercial use.

Specifically, there are many considerations that go into a credit assessment for a large energy project, most of which have nothing to do with the "early mover" risk that the loan guarantee program was designed to offset. Indeed, many of those considerations are identified in Section 609.6(b) of the proposed rule. Those include such things as: the balance sheet and experience of the project sponsor; the availability of cost recovery from ratepayers or a revenue stream under a power purchase agreement; the quality of project management planning; the reputation for quality and performance of any critical technology or equipment vendor; construction contractor experience and performance in comparable projects; the shifting of risks to others through performance guarantees and liquidated damages contract clauses; the amount of equity contribution and other elements of the financing structure.

Dominion proposes that DOE modify the credit assessment requirement so that the credit analysis takes into account these typical project considerations, but omits consideration of *both* the loan guarantee *and* the "early mover" risk that makes the loan guarantee essential. To avoid unduly limiting the potential sources for such credit assessments, Dominion further recommends that, in both Section 609.6 and Section 609.9, DOE require initial and final "credit assessments" from an "independent credit expert" rather than a "credit rating" from a national rating agency.

4. Priority Processing of Lower Risk Projects

DOE has consistently emphasized its goal of minimizing the government's risk in the loan guarantee program. One way DOE can do that is by offering priority processing to applicants who, by an objective measure, present lower risk. Specifically, other things being equal, DOE reduces the government's risk by entering into loan guarantees of shorter terms than the statutorily allowed maximum. Priority processing of such lower risk projects would also further the President's Advanced Energy Initiative by facilitating more rapid deployment of qualifying technologies.

A loan guarantee applicant has no incentive to seek less than the statutorily allowed maximum term unless there is some clear and substantial benefit to it of doing so. Priority processing of loan applications for shorter term loans would provide a significant incentive to those whose projects are well advanced and whose only need for the loan guarantee arises from "early mover" risk. A guarantee that would extend only through the first five years of commercial operation would substantially reduce the government's risk exposure. At the same time, that should be a sufficient period to address the concerns of the capital markets about "early mover" risk. While this option plainly would not work for all projects or all project sponsors, Dominion strongly urges DOE to provide it as an option under the rules.[8]

Indeed, because of the delays in commencing the loan guarantee program, the failure to provide such an accelerated option could well result in projects that further national energy policies being replaced by less desirable, but proven technology options. The pressing need to begin in earnest the development of new generation resources may force this result. This is certainly the dilemma Dominion confronts.

Dominion is experiencing rapid load growth in its Virginia service territory. PJM, the regional transmission organization in which Dominion participates, projects that, over the next ten years, Dominion's service territory will be the fastest growing in all of PJM. Dominion hopes that the new North Anna unit 3 will be an important base load generating facility that directly addresses Virginia's load growth and supports the strong economic growth that exists in the state.[9] However, because the lead time for a new

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[8] DOE could and should reserve the right to move a project out of priority processing if it were to become apparent in the course of the loan guarantee application process that some other increased risk factor offset the benefit of the shorter term loan.

[9] Virginia's strong economy reinforces the case that North Anna unit 3 would be a good investment for the government. Virginia is ranked #1 among "Top States for Business" by

nuclear plant, including licensing and construction, is seven years or more, Dominion is becoming concerned that a lengthy loan guarantee approval process, which must precede and adds to the time required for licensing and construction, could force Dominion to turn to an alternative base load generating option, quite possibly pulverized coal.

On the other hand, the North Anna project has received strong support from the community, as well as from stakeholders throughout the state and from the Virginia legislature, and Dominion has deep experience as a nuclear plant operator and NRC licensee. Thus, the company has a high degree of confidence that it will be able to refinance its North Anna project within a few years of commencing commercial operation. If it were offered the option of priority processing for a shorter term loan, it would exercise that option in order to maximize the likelihood that it will be able to proceed with North Anna unit 3 in time to support its anticipated load growth needs.

Key elements of priority processing should include a pre-application process that will give an applicant an early evaluation of the likelihood it will ultimately receive a loan guarantee and, as discussed in Section 5 below, an early preliminary analysis of the likely Credit Subsidy Cost.

5. Credit Subsidy Cost

In part because it is an upfront and non-refundable payment obligation, the Credit Subsidy Cost has the potential to make loan guarantees uneconomic. In Sections 609.2, 609.6 and 609.12, the proposed rule makes clear the obligation of an applicant to pay the Credit Subsidy Cost, but the rule provides virtually no explanation as to how the cost will be computed, and there is no provision for the applicant to have input into the process of determining an appropriate Credit Subsidy Cost. Dominion requests that DOE issue written guidance as to the specific considerations that will enter into the determination of the Credit Subsidy Cost and how those considerations will be applied.[10] DOE should further modify the rule to: i) provide for early disclosure to an applicant of how DOE expects to apply those considerations in the determination of the Credit Subsidy Cost for the applicant's project; and ii) afford the applicant an opportunity to respond in writing for the purpose of allowing DOE to determine whether additional considerations and analysis warrant a re-determination.

These proposals seek to provide critical transparency into a vitally important element of the loan guarantee process, while avoiding the creation of an elaborate and lengthy bureaucratic process for the establishment of the Credit Subsidy Cost. The modification is particularly appropriate given combination of: i) the wide range of technologies, with widely differing risk considerations, for which loan guarantees are

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Forbes magazine; it is #1 in high tech job growth; and it is one of only seven states with a AAA bond rating. Dominion's ability to deliver power at industrial rates that are almost one-third *below* the national average surely contributes to these strong economic statistics.

[10] Dominion does not believe such guidance should be embodied in the rule itself. DOE should have the flexibility to adapt and revise the guidance readily as its experience with the loan guarantee program evolves.

available, and ii) the fact that, by definition, the guarantees are only available to projects that do not have a large number of "comparables" against which DOE can measure project quality and risk.

6. Other Federal Assistance

In its discussion of proposed Section 609.7, DOE suggests that it is desirable that any project receive only one form of financial assistance. DOE acknowledges that it may be appropriate to create exceptions for nuclear projects with respect to risk insurance and production tax credits. However, these exceptions are not sufficient. If rigorously applied, DOE's proposed policy, even with the noted exceptions, will potentially exclude most new nuclear projects, and perhaps many other projects, from the loan guarantee program.

For many years, DOE has engaged in support of research and development of a variety of advanced energy technologies. In particular, DOE has lent support to the development of new nuclear plant designs. Does DOE intend to treat that kind of financial assistance as a negative factor in evaluating projects that incorporate advanced nuclear plant designs developed by Westinghouse and GE in part with DOE funding? That would surely be an irrational result, which Dominion hopes DOE does not intend. But the problem with the proposed rule goes beyond that. Many of the companies whose plans for new nuclear plants are the most fully developed, notably including Dominion, have participated in and received funding under such programs as the Nuclear Power 2010 Program, operated by DOE's Office of Nuclear Energy. DOE's very purpose in creating and funding such programs was to speed the deployment of new nuclear plants. If participation in such programs is now to be deemed a negative factor in the evaluation of a loan guarantee application, that will directly undermine the original intent of DOE's own programs and produce an irrational result.

It is understandable that DOE would want to see a significant private sector commitment to any project that receives a loan guarantee. However, the rule as written and DOE's explanation of how it proposes to apply it sweep far too broadly and threaten to undermine a host of policy and R&D objectives DOE's program offices have promoted for many years. If there is to be a restriction in the loan guarantee program related to receipt of other forms of federal financial assistance, it should focus directly on the question of whether there is so much federal support for a project that no significant private investment in or commitment to a project is apparent.

7. Technology Availability

Section 609.6(b)(5)(v) of the proposed rule requires each applicant to describe how it "intends to assure the further commercial availability of the technology(ies) in the United States." As drafted, this rule reflects a misconception about the ownership of technology rights. Dominion, probably like many other loan guarantee applicants, will own no technology related to the project for which it seeks a guarantee. As described above, North Anna unit 3 will use a GE-owned design that Dominion will employ under

a license with GE. That license will give Dominion no rights to make the technology available to others, and thus Dominion can do nothing to "assure" the technology will be made available to others. The rule should be redrafted to impose this obligation only on loan guarantee recipients that are also the owners of the technology embodied in a guaranteed project.

8. Legal Opinions

Section 609.6(b)(18) of the proposed rule requires that an applicant provide copies of "*all* legal opinions and other material reports, analyses and reviews related to the project." (Emphasis added.) Dominion urges DOE to re-think this sweeping provision so that it is comparable in timing and scope to what is routinely required in the commercial lending arena.

Giving the many-faceted complexity of developing a new nuclear project and the multiplicity of legal issues such a project entails, it is certain that there will be numerous legal opinions on sensitive topics that relate in some way to a project but that may never have been or are no longer material to the project risk issues about which DOE may be concerned. Legal opinions could relate to such matters as long resolved questions about permitting or licensing, employment claims, or organizational structures for the project that are no longer under consideration. Legal opinions could also relate to highly sensitive issues such as the relative rights and obligations of the project sponsor and its various vendors, which could have great significance in the event of disputes, but they likely would not bear materially on risk to the government. Disclosing these to DOE in connection with a loan guarantee application creates risks of inadvertent public disclosure and of waiver of the attorney/client privilege of the project sponsor, which could be extremely damaging in the event of future litigation wholly unrelated to the loan guarantee.

In financing agreements for major energy projects, lenders do not seek a library of the legal advice and counsel that a project sponsor may have received from the inception of the project. Rather, at financial closing, they insist on pertinent representations and warranties in the transaction documents and a legal opinion relating to such matters as: the authority of the company to enter into the transaction; the binding nature of the obligations the company is undertaking under its organizational documents and under applicable law; and the enforceability of any collateral security agreements. Depending on the nature of the transaction, the opinion of counsel may also cover certain regulatory permitting or licensing issues. The opinion of counsel in support of a transaction is something that is negotiated between borrower's counsel and lender's counsel on a transaction-specific basis, so that it is appropriate to the transaction and adequately protects the lender without imposing an undue burden on the borrower or any threat to borrower's attorney/client privilege. This approach is time-tested and widely accepted by large commercial lenders as providing the right balance of interests. It is the approach DOE should adopt.

9. Commercial Technology Definition

DOE requests comment on two alternative approaches to applying the statutory test of when a technology is "not in general use." Section 609.2 (definition of "Commercial Technology"). The first alternative DOE proposes—whether a technology "has been ordered for, installed in or used in five or more projects in the United States at the time the loan guarantee is issued"—would be entirely unworkable as applied to nuclear projects. Given the long lead time for new nuclear plants, it is quite conceivable that a particular nuclear plant design will be the subject of five or more orders long before it has been proven in the operation of even a single plant. Moreover, applying any test at the time a loan guarantee is issued, as opposed to at the time of application, would subject an applicant to an unwarranted change in eligibility for a guarantee, relating to circumstances that are wholly beyond its control, after it has invested heavily in the loan guarantee process.

The alternative test DOE proposes, whether a technology has been in commercial operation for five years, is appropriate and would put potential loan guarantee applicants on notice at the outset of the application process whether they will be able to meet the "in general use" test. Dominion further agrees that five years is a suitable period of operation for proving the commercial viability of a particular technology.

10. Pledging Non-Project Assets

In Section 609.10(d)(10), DOE indicates that it can insist, as a condition of entering into a loan guarantee, that the applicant pledge assets beyond those of the guaranteed project in order to secure repayment. Large energy projects are routinely financed in the debt market on a non-recourse basis. There is nothing in the loan guarantee program that warrants a different approach. Indeed, as noted, Dominion would build any new nuclear plant as a regulated utility asset, as part of Dominion Virginia Power, and it is unclear at best that Virginia utility regulators would allow Dominion Virginia Power to so encumber other utility assets. DOE should remove Section 609.10(d)(10) from the proposed rule as a requirement, although it should allow the flexibility for an applicant that may wish to do so to voluntarily pledge additional assets as a means to reduce the Credit Subsidy Cost.